United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2588

B

In The

United States Court of Appeals

FOR THE
SECOND CIRCUIT

No. 74-2588

BERRY PETROLEUM COMPANY, an Arkansas Corp. (Dissolved); J. E. O'DANIEL; YVONNE LAW; McALESTER FUEL COMPANY and GERLAND P. PATTEN & Co., INC.,
Plaintiffs-Appellants,

v.

ADAMS & PECK; ALLEN & COMPANY, INCORPORATED; AMERICAN STOCK EXCHANGE; ARTHUR YOUNG & COMPANY A. BRUCE ROZET; OLIVER A. UNGER; IRVING GOLDSTEIN; SIDNEY KIBRICK; RICHARD A. SARAZAN; RODNEY W. LOEB; ARNE KALM; H. IGOR ANSOFF; GOTTFRIED von MEYERN HOHENBERG; HOWARD D. MARTIN; PETER GETTINGER; KLEINER, BELL & Co., KLEINER, BELL & Co., INC.; BURT KLEINER; LIONEL BELL; RALPH SHAPIRO; THEODORE SAYERS; PETER HUANG; BENJAMIN F. BRESLAUER; SOL STAMESHKIN BRYCE CRIDER; ELY A. LANDAU; JAMES A. LEWIS ENGINEERING a Division of UNIVERSITY COMPUTING CORPORATION; and VARIETY INC.,
Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of New York

BRIEF FOR APPELLANTS

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2. Are plaintiffs who were unnamed *Berry I* class members barred by *Land* despite: (1) their request for exclusion and release of participation rights in *Land* settlement proceds; (2) the refusal of the Multi-District Panel to consolidate *Berry I* with *Land;* and (3) the Berry Commonwealth agreement's execution on August 20, 1968, before the beginning of the October 16, 1968 acquisition period defined for the *Land* class?

3. Is there an issue of fact as to whether Berry Petroleum Company suffered damage in selling its assets for Commonwealth shares represented to be worth $14, but which were in fact practically worthless?

4. Does the complaint state a claim against American Stock Exchange?

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STATEMENT OF THE CASE

Berry Petroleum Company (Berry), and four others individually and for its former shareholders as a class, commenced

this action for damages on December 15, 1972, in Dallas, Texas, in the U. S. District Court for the Northern District of Texas under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and pendent common law concepts. Defendants are twenty-eight officers, directors and controlling persons of Commonwealth United Corporation (Commonwealth), and its underwriters, consultants, publicists, and the American Stock Exchange. The Judicial Panel on Multi-District Litigation transferred the action to the United States District Court for the Southern District of New York (Hon. Frank H. McFadden sitting by assignment) for pretrial proceedings. 362 F. Supp. 568 (Jud. Pan. Mult. Lit. 1973).

Plaintiffs alleged that defendants by fraud induced Berry Petroleum Company, and its shareholders, to sell its assets for Commonwealth stock in violation of the federal securities laws to the injury and damage of plaintiffs.

On August 14, 1974, the District Court, upon motions to dismiss, entered Summary Judgment for defendants Kleiner Bell Group, Arthur Young & Company, and Allen & Company, Incorporated, and dismissed as to all other defendants. (App. 57, 58)

This is an appeal from the Summary Judgment and Order of Dismissal of the District Court.

STATEMENT OF FACTS

On August 20, 1968, Berry agreed to sell all of its assets to Commonwealth in exchange for Commonwealth common stock. (App. 17 ¶ 18) Berry was an Arkansas company with over twenty-five years of profitable operation, no long term indebtedness and approximately $2,000,000 in liquid assets, engaged in the business of producing, refining and marketing crude oil and its products. By this agreement, Berry and the 977 shareholders holding its 545,000 outstanding shares agreed to transfer Berry's assets and shares to Commonwealth at a ratio of one Commonwealth share — represented to be worth 14.00 — for every .82 Berry share. (App. 17 at ¶ 18; ¶ 20; 45)

The representations of Commonwealth's financial condition made to Berry and its shareholders were false and Commonwealth's common stock was proven not to be worth fourteen dollars per share, as represented, but to be worthless.[1] (App. 17 at ¶19-20.) As alleged in appellant's complaint, Commonwealth and the defendants herein made these misrepresentations both as warranties in the agreement of August 20, 1968, and by distributions of a proxy statement and other material to Berry and its shareholders.(App. 19 at ¶ 22d, e-g, i,; 36 at ¶ 4) In particular, Commonwealth's underwriters, accountant, and agents actively represented as late as December 31, 1969, that the oil and gas reserves held by Commonwealth's wholly owned subsidiary, Sunset International Petroleum Corporation, were worth millions of dollars. (App. 21 at ¶ 22 g-k) In fact, the Sunset reserves were worthless, and when Sunset began Chapter XI

[1] See *Unaccountable Accounting — Games Accountants Play*, Briloff (Harper & Row, New York, 1972), p. 171 "Commonwealth United's New Year's Ball".

proceedings in May, 1970, Berry and its shareholders learned for the first time of this and other falsehoods (App. 23 at ¶ 24).

Berry and three of the four shareholder plaintiffs in this action brought suits in 1971 against Commonwealth to rescind the Berry-Commonwealth exchange in two actions, later combined in the U. S. District Court for the Western District of Arkansas, Civil Actions ED-70-C-85 and ED-71-C-15. (*"Berry I"*; App. 43 at ¶ 1-2) The Multi-District Panel denied Commonwealth's motion to transfer that litigation to the Southern District of New York for pretrial proceedings. 333 F. Supp. 911, 912 (Jud. Pan. Mult. Lit. 1971.) The Arkansas Court approved the action as a class action and it was settle with notice on October 2, 1972. (App. 49)

Before the Arkansas settlement, Berry and the class in the Arkansas litigation, by their attorneys, filed and served a request for exclusion from the *Land* class action pending in the Southern District of New York prior to April 10, 1972, with service on *Land* attorneys as prescribed in the *Land* Court's Order and Notice. (App. 43-44; 150-151.)

On December 15, 1972, Berry and the class brought this suit to recover damages against the alleged aiders and abetors, including underwriters, accountant, and individuals, of Commonwealth's fraud in the United States District Court in Dallas, Texas, where the August 20, 1968, agreement between Berry and Commonwealth had been negotiated and closed. (*"Berry II"*; App. 13)

ARGUMENT

I

THE DISTRICT COURT ERRED IN FINDING APPELLANTS' ACTION BARRED BY LIMITATIONS

A. The Texas two-year statute of limitation, Art. 5526, Tex. Rev. Civ. Stat., does not apply to 10b-5 actions.

The District Court held that: ". . . the Texas two-year statute of limitations Article 5526, Tex. Rev. Civ. Stat. is applicable here and that the claims of the plaintiffs are barred." (App. 67)

That holding is exactly contrary — and cannot be reconciled — to *Richardson v. Salinas,* 336 F. Supp. 997, 1001 (N.D. Tex. 1972), where the Court held ". . . that 10b-5 actions brought in Texas are controlled by the three-year limitation period" of the Texas Blue Sky Law, Art. 581-33, C. Judge Hill, in determining which statute "best effectuates the Federal policy", found that the Texas two-year statute of limitations, Art. 5526, Tex. Rev. Civ. Stat., was not specifically intended to apply to fraud actions and that "the Texas Blue Sky Law is closer in both substance and purpose to Rule 10b-5." 336 F. Supp. at 999, 1001; 15 U.S.C. §78j(b); 17 C.F.R. 240 10b-5; Art. 581-33, A. (2), C., Tex. Rev. Civ. Stat.[2]; see also *Josefs v. Southern Inv. Co.,* 349 F. Supp. 1057, 1059, 1060 (S.D. Fla. 1972); *Annual Survey of Texas Law, Corporations,* Lebowitz, SW.L.J. 85, 113-114 (1973).

Neither can the District Court's holding be reconciled with *Hudak v. Economic Research Analysts,* 499 F. 2d 996, 999-

[2] See Appendix, *Infra* A-1, to compare the similarity of the Federal and Texas statutory schemes to protect purchasers of securities from misrepresentations.

1000 (5th Cir 1974), where the Fifth Circuit applied the limitations period of the Florida Blue Sky Law instead of the Florida period for common law fraud, holding:

> "Defendants contend, however, that §517.301(1) of the Florida blue sky laws, which deals with fraudulent transactions in securities, more nearly embodies the policies behind section 10(b) and the related Rule 10b-5, and that the two-year limitations period applicable in suits brought to rescind sales conducted in violation of that statute should therefore govern a 10b-5 action in Florida. We find this argument persuasive.
>
> * * *
>
> "We concur in the reasoned judgments of the Seventh and Eight Circuits which, when faced with the present choice between a forum state's fraud and blue sky limitations periods for use in federal securities litigation, found the similarity between the blue sky and 10b-5 scienter requirements crucial to their determination."

As *Richardson v. Salinas,* Supra, at 999, recognized, the 10b-5 scienter requirements are similar to those of the Texas Blue Sky Law Art. 581-33 but substantively different from those necessary to prove a common law fraud in Texas.15 U.S.C. §78j(b); Art. 581-33 A(2)., Tex. Rev. Civ. Stat.; *Chagas v. Berry,* 369 F. 2d 637, 638 (5th Cir. 1966); *Gould v. American Hawaiian Steamship Company,* 351 F. Supp. 853, 860-861 (D.C. Dela. 1972); see also *Civil Remedies Under the Texas Securities Laws,* Bordwine, 8 Houston Law Review 657 (1971).

Thus, the District Court's view that it ". . . seems inappropriate to borrow the limitation on the right created by the Texas legislature (Art. 581-33, C.) and apply it to the right created by the Congress under §10-b of the Securities Exchange Act, 15 U.S.C. §78j(b)" is simply without support under controlling Fifth Circuit precedent or in logic. (App. 66)

B. Appellants did not know and could not have known of the fraud more than three years prior to the commencement of this action.

The District Court held that the "action is barred even if the three-year statute were applicable because the fraud on which the suit is based was known or should have been known more than three years prior to the commencement of the suit." (App. 67 at fn. 3) There is no support for this holding in the record.

A 10b-5 claim accrues when the plaintiff actually discovers the alleged fraud. *Sargent v. Genesco,* 492 F. 2d 750, 758 (5th Cir. 1974). Discovery of the fraud means either actual knowledge or notice of facts which in the exercise of due diligence would have led to actual knowledge of the fraud. *Josef's v. Southern Inv. Co., supra,* at 1061.

Appellants' complaint alleged that defendants concealed from plaintiffs the fraud until some time "after May, 1970, when Sunset filed Proceedings for Reorganization", and this allegation is itself sufficient to withstand appellants' motion to dismiss on a plea of limitations. (App. 23 at ¶ 24); *Putkammer v. Stifel Nicolaus & Co.,* 1973-74 CCH Fed. Sec. L. Rep. 94-359 at pp. 95,221-95,222 (N.D. Ill. 1973).

But, additionally, in this record no facts belie or refute plaintiffs' allegation and the District Court has summarily and without basis denied appellants the right to prove that the fraud was first discovered some time after Sunset filed Chapter XI proceedings in May, 1970. *R. J. Reynolds Tobacco Co. v. Hudson,* 314 F. 2d 776, 783, 788 (5th Cir. 1963); *Hooper v. Mountain States Securities Corp.,* 282 F. 2d 195, 206 (5th Cir. 1960) cert. den., 365 U.S. 814.

II

THE DISTRICT COURT ERRED IN HOLDING THAT APPELLANTS WERE MEMBERS OF THE LAND CLASS

A. Appellants "opted out" of the land action.

The District Court held that the request for exclusion filed in *Land* by the *Berry I* plaintiffs through their attorneys, was ineffective as to the unnamed class members of *Berry I* because the *Berry I* attorneys lacked authority to request exclusion for the class and because a request for exclusion must be made by each separate member of the class, individually, or by an attorney specifically authorized to do so. (App. 63) The trial court cited — and there is — no authority for this holding.

There is, however, authority that named and representative plaintiffs act for the entire class from the commencement of an action. In *American Pipe & Construction Co. v. State of Utah*, 414 U.S. ....., 38 L. Ed. 2d 713, 94 S. Ct. 756, 764-765 (1974), the court held:

> "A federal class action is no longer an 'invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions. Under the circumstances of this case, where the District Court found that the named plaintiffs asserted claims that were 'typical of the claims or defenses of the class', and would 'fairly and adequately protect the interests of the class', Rule 23(a) (3), (4), the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue. Thus, the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiff."

Rule 23(c) (2) is silent as to "opting out" methods but courts have disregarded form in favor of determining if "notice was communicated" of a desire to be excluded. *In Re Four Seasons Securities Laws Litigation*, 493 F. 2d 1288, 1291 (10th Cir. 1974); 7A Wright and Miller, *Federal Practice and Procedure* §1787 (West Publishing Co., 1972).

On April 4, 1972, no settlement in *Berry I* or *Land* had been made and the attorneys for the *Berry I* class had not only authority but the positive duty to procedurally exclude their clients from *Land* to prevent the possibility of conflicting decisions and to preserve the independent status of the *Berry I* action in Arkansas. See *State v. McDonald*, 50 Wis. 2d 534, 184 N.W. 2d 886, (Wis. Sup. 1971); *Mountain States T. & T. Co. v. Department of Labor and Employment, et al.*, Colo. 520 P. 2d 586, 589 (1974).

Thus, the attorneys for the class in *Berry I* before April 10, 1972, filed and served by mail of April 4, 1972 — as directed by the Court's notice — the request for excluding the *Berry I* class from the *Land* action without challenge. (App. 43-44; 150-151.) In July 1972, they executed the stipulation of settlement of the *Berry I* action on behalf of the class, again without challenge. (App. 49; 216; 218.)

After the request for exclusion from *Land*, the *Berry I* class members individually accepted the Arkansas settlement proceeds in ratification of these actions in their behalf. (App 45; 216; 218.) See *Stark v. Starr*, 94 U.S. 477, 491, 24 L. Ed. 276 (1876). No objections were raised by anyone, including appellees, the Multi-District Panel, or the United States District Courts for the Western District of Arkansas and the Southern District of New

York, to the *Berry I* attorneys' procedural excusion of their clients from *Land* or their authority to represent the *Berry I* class. See 333 F. Supp. 911, 912 (Jud. Pan. Mult. Lit. 1971); (App. 216; 218).

But now, belatedly and without any constitutional grounding, the District Court has nullified plaintiffs' request for exclusion and in one stroke denied the fundamental due process rights of Berry and its shareholders to the discovery and hearing of their grievances against the aiders and abetors of the Commonwealth scheme. See *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Constitution of the United States, Analysis and Interpretation, Revised and Annotated,* 1145-1146 (Library of Congress, Congressional Record Service, U.S. Govt. Printing Office, 1973).

The District Court's opinion apparently further implies that the *Berry I* plaintiffs somehow benefited from the *Land* settlements. (App. 63) This implication is mistaken. The *Berry I* settlement stipulation expressly recognized that:

> "Independent negotiations for settlement of the *Land* Action are presently being conducted, and if said action is settled, approval of the Court in which it is pending will be required." (App. 50 at § 1.3)

The *Berry I* stipulation in seriatim explicitly provided for "effectuation of this settlement if the Plan of Settlement [in *Land*] cannot be consummated." (App. 51 at § 1.5) Although not part of the record in this action, the *Land* settlement agreement also recognized that "independent negotiations for settle-

ment of the Berry Cases are expected to result in a stipulation of settlement therein. . . ."[3] (App. 153 at § 1.3)

That the *Berry I* settlement was not intended to release appellees is further and strikingly evidenced by the difference in the language of the *Berry I* release and the *Land* release, each prepared by defense counsel. (App. 47, 48, 168).

The *Land* plaintiffs released all defendants in that litigation:

> "I (we) do hereby release Commonwealth United Corporation, each of its subsidiaries, and each person who is a party to the Stipulation of Settlement in the above captioned matters. . . ." (App. 168)

In contrast, the *Berry I* plaintiffs only released Commonwealth:

> ". . . the undersigned hereby releases and forever discharges the said Commonwealth United Corporation and its present and former subsidiary corporations of any and all claims. . . ." (App. 47)

In all events, only those appellees granted a dismissal with prejudice can possibly claim the bar of the final orders in *Land*. (See Final Orders and Judgments of November 29, 1972 and December 15, 1972, App. 227, 172) Indeed, eight defendants in this action, namely, Adams & Peck; Allen; American Stock Exchange; Stameshkin; Crider; Landau; James A. Lewis Engineering and Variety, Inc., were not defendants in *Berry I* or *Land*, and could not be dismissed in this action by virtue of proceedings in *Land*.

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[3] Appelle Arthur Young & Company at one time contended by affidavit that appellants are entitled to share in Young's *Land* settlement payments, but later retracted this proposal and no such participation occurred. (App. 38 at ¶14)

B. Appellants were not within the Land class definition.

The trial court held that "the Berry shareholders acquired CUC shares for value after October 16, 1968" and therefore were included in the *Land* class. (App. 62) This conception of the *Berry I* class is erroneous.

The basic contract of the Berry-Commonwealth transaction was the "Plan and Agreement of Reorganization" excuted on August 20, 1968. (App. 17 at ¶ 18) In that contract, Berry agreed to sell substantially all of its assets to Commonwealth in exchange for Commonwealth stock. See *Craddock-Terry Co. v. Powell*, 181 Va. 417, 25 S.E. 2d 363, 370 (1943). Under the 1934 Act, "purchase" and "sale" include any "contract" to purchase or sell. 15 U.S.C. § 78c(a) (13), (14); *Smallwood v. Pearl Brewing Co.*, 489 F. 2d 579, 590-591 (5th Cir. 1974). A resolution to merge, "like a partially consummated contract" is, for the purposes of the securities laws, a purchase or sale. *Herpich, et al. v. Wallace, et al.*, 430 F. 2d 792, 809 (5th Cir. 1970).

The same is true by Arkansas law, where a corporate sale of assets can be made by the Board of Directors of a corporation, subject to approval of two-thirds of the outstanding shares. §64-803 (Ark. Stat. 1947, Anno).

Thus the purchase of the Commonwealth securities was in fact made under both the federal and Arkansas statutes upon the execution of the contract of August 20, 1968. While delivery of the stock to Berry and distribution to its shareholders following dissolution occurred after October 16, 1968, these were ministerial acts flowing from the contractual obligation

made on August 20, 1968. The actual "purchase and sale" of the Commonwealth securities was made upon execution of the agreement to purchase on August 20, 1968. *Herpich, et al., v. Wallace, supra,* 430 F. 2d at 809-810; *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 388, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970). Finally, the Multi-District Panel recognized in 1971 the separate and distinct nature of the Commonwealth misrepresentations in the *Berry* transaction by declining to consolidate plaintiffs' initial actions with *Land.* 333 F. Supp. at 912.

III

THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT AGAINST BERRY PETROLEUM COMPANY ON THE GROUND THAT IT HAD NOT BEEN DAMAGED.

Berry Petroleum Company, after twenty-five years of profitable operations for its Arkansas shareholders, sold to Commonwealth valuable oil and gas properties, refineries, and land, including liquid assets of $2,000,000, for Commonwealth common stock which, while at the time having market value because of fraud and manipulation, was essentially worthless. See *Norte & Company v. Huffines,* 288 F. Supp. 855, 861 (S.D. N.Y. 1968).

Appellants' complaint alleges that defendants' fraud induced the transfer which ended Berry's business, and the District Court's finding that as a matter of law the Company suffered no damage is erroneous. (App. 17 at ¶ 18-22; 64) As the Court observed in *Supt. of Insurance v. Bankers Life & Cas. Co.,* 404 U.S. 6, 10-11, 30 L. Ed. 2d 128, 92 S. Ct. 165 (1971):

> "As the Court of Appeals for the Fifth Circuit said in the Hooper case, 'considering the purpose of this legislation, it would be unrealistic to say that a corporation having the capacity to acquire $700,000 worth of assets for its 700,000 shares of stock has suffered no loss if what it gave up was $700,000 but what it got was zero.' 282 F. 2d 203."

Similar corporate damage was found in *J. I. Case Co. v. Borak,* 377 U.S. 426, 432, 12 L. Ed. 423, 845 S. Ct. 1555 (1964):

> "The injury which a stockholder suffers from corporate action pursuant to a deceptive proxy solicitation ordinarily

> flows from the damage done the corporation, rather than from the damage inflicted directly upon the stockholder. The damage suffered results not from the deceit practiced on him alone but rather from the deceit practiced on the stockholders as a group. To hold that derivative actions are not within the sweep of the section would therefore be tantamount to a denial of private relief."

Fidelis Corporation v. Litton Industries, Inc., 293 F. Supp. 164, 168-169 (S.D.N.Y. 1968), dealt specifically with a sale of assets followed by liquidation and transfer of proceeds to shareholders and held:

> "In such a situation, the individual plaintiffs, as well as the corporation, may maintain a cause of action for fraudulent misrepresentation."

In sum, it is now established that a corporation — here Berry — can sue for itself and on behalf of its shareholders in 10b-5 fraud actions. *Fidelis Corporation v. Litton Industries, Inc., supra,* at 168-169; *Petit v. American Stock Exchange,* 217 F. Supp. 21, 27 (S.D.N.Y. 1963); *Hooper v. Mountain States Securities Corp.*, 282 F. 2d 195, 206-207 (5th Cir. 1960), *cert. denied,* 365 U.S. 814; *Mills v. Electric Auto-Lite Co., supra,* at 388;

Smallwood v. Pearl, supra, particularly treated the corporate standing to attack under 10b-5 a sale of assets:

> "Pearl and Southdown entered into a contract whereby on the effective date of the merger all of Pearl's assets were transferred to Southdown in return for Southdown prefered stock issued to Pearl's shareholders. Pearl was the contracting party and provided the consideration. In effect, Pearl bought the Southdown stock for its owners, the Pearl shareholders. Although not an active conduit or the ulti-

> mate recipient of the Southdown preferred stock, Pearl acted as a 'purchaser' in all other respects. Little purpose would be served by hinging Smallwood's standing to sue derivatively under Rule 10b-5 entirely on the failure of Pearl to have physical possession of the shares, and we decline to do so." 489 F. 2d at 592.

Hence, Berry, in purchasing the Commonwealth stock, was also acting as agent for its shareholders. *Cavaness v. General Corporation,* 283 S.W. 2d 33, 37 (Tex. Sup. 1955) applied the Texas rule that an agent with an interest in the subject matter may sue in his own name on behalf of his principal:

> "The Restatement, of course, recognized (Sec. 372) the undoubted rule that a person, who had a personal interest in the subject matter of a contract, which he has made of even a disclosed principal, may maintain an action in his own name and for his individual benefit on the contract. See also *Tinsley v. Dowell,* 87 Tex. 23, 26 S.W. 946; *Scott v. Louisville & N.R.Co.* 170, Tenn. 563, 98 S.W. 2d 90. And, as indicated by the *Tinsley* case, the petitioner's ownership of the patent rights in the instant case would be the kind of personal interest contemplated by the rule."

Coronado Development Corp. v. Millikin, 22 N.Y.S. 2d 670, 674 (Sup. Ct. 1940) correctly perceived the standing test to be but one of injury:

> " . . . the test must be whether or not assets of the corporation have been lost or destroyed or depreciated or its business interfered with, for if so there is a direct injury to the corporation and recovery therefor should go to it so that all stockholders may benefit from the recovery in proportion to their stock holdings, and if not no right of the corporation has been invaded and it is not justly entitled to any recovery."

Here, Berry was the contracting party with Commonwealth,

furnished the consideration for the stock which it purchased for the benefit of its stockholders, and has a right of action against the wrong-doers for their injury.

IV

APPELLANTS PLEADED A CLAIM UPON WHICH RELIEF CAN BE GRANTED AGAINST AMERICAN STOCK EXCHANGE

Appellants' complaint alleged that the defendants, including the American Stock Exchange, upon which Commonwealth securities were traded, knew or should have known that the Commonwealth registration statement and Seeburg prospectus, distributed to Berry shareholders in October, 1968, were false. (App. 23 at ¶ 23) Appellants' complaint also alleged that defendant American Stock Exchange was negligent in permitting Commonwealth listing applications and the actions and practices of Commonwealth designed to manipulate its market price. (App. 22 at ¶22(n)) Nevertheless, the District Court held that: "the complaint fails to state a claim against . . . defendant [American Stock Exchange] upon which relief can be granted." (App. 60) The record does not support this holding.

In *Pettit v. American Stock Exchange*, 217 F. Supp. 21, 28 (S.D. N.Y. 1963), plaintiff similarly pleaded the existence of a conspiracy to defraud among all defendants, asserting that " . . . defendant Exchange and its officers aided, abetted, and assisted the illegal distribution of Swan-Finch stock by failing to take necessary disciplinary action against abusive conduct and practices of which they knew or should have known."

The *Pettit* court denied motions to dismiss prior to completion of discovery, observing that: "As in the case of Section 10(b), however, the statutory scheme should not be so restricted where, as here, the loss to the corporation arises from a fraudulent transaction in its securities which is successfully

perpetuated through the conduct of the Exchange." *Pettit v. American Stock Exchange, supra,* at 29; see *SEC v. Texas Gulf Sulphur,* 401 F. 2d 833, 886-887 (2nd Cir. 1968), *cert. den.,* 394 U.S. 976, *reh. den.,* 404 U.S. 1064.

The *Pettit* court also recognied that it was immaterial at the early stages of an action that some of plaintiff's allegations imputed fraud and some negligence, as does appellants' complaint here, because Rule 8(e)(2), Fed.R.Civ.Pro., permits allegations of separate claims regardless of consistency. 217 F. Supp. at 30, fn. 30; see *Fischer v. Kletz,* 266 F. Supp. 180, 191-192 (S.D. N.Y. 1967). At the least, viewing appellants' complaint in the light most favorable to plaintiffs, as it must be, the District Court was premature, first, in vacating plaintiffs' notice of depositions by Order of August 13, 1973 and, then, in dismissing appellants' suit without permitting any discovery to discern the facts surrounding the Commonwealth violations.[4] *Miller v. Bargain City,* 229 F. Supp. 33, 36, 38 (E.D. Penn. 1964).

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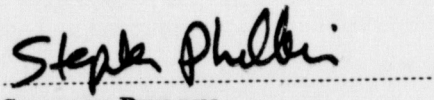
[4] See Order of August 13, 1973 vacating plaintiffs' August 12, 1973 notices to take depositions of defendants Howard D. Martin and Jones A. Lewis Engineering, a Division of University Computing Corporation at *Index to the Record on Appeal,* Document 17A, filed December 6, 1974, (See App. 32 at ¶ 1-4)

CONCLUSION

The District Court's summary judgment and dismissal of appellants' complaint has no basis in the record or in law. The judgment should be reversed and the action remanded for trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was mailed this 7 day of February, 1975, to all counsel of record listed below:

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APPENDIX OF STATUTORY MATERIALS

Texas Blue Sky Law, Art. 581-33 A. (2); C., Tex. Rev. Civ. Stat:

Art. 581-33. Civil Liabilities

A. Any person who

* * *

(2) Offers or sells a security (whether or not the security or transaction is exempt under Section 5 or 6 of this Act)[3] by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made not misleading (when the person buying the security does not know of the untruth or omission, and who in the exercise of reasonable care could not have known of the untruth or omission) is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six per cent (6%) per year from the date of payment, less the amount of any income received on the security upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest at six per cent (6%) per year on such value from the date of disposition. Nothing herein shall prevent the award of punitive or exemplary damages in an amount not to exceed twice the actual damages, as found by the jury, when such false representation or omission is proven to be willfully made.

* * *

C. No person may sue under Subsection A(1) of this Section 33[5] more than three (3) years after the contract of sale. No person may sue under said Subsection A(1) if the buyer received a written offer accompanied by reasonable financial information before suit and at a time when he owned the security, to refund the consideration paid together with interest at six per cent (6%) per year from the date of payment, less the amount of any income received on the security, and he failed

to accept the offer within thirty (30) days of its receipt; or if the buyer received such an offer in the amount specified above less the value of the security when the buyer disposed of it, and less interest at six per cent (6%) per year on such value from date of disposition, before suit and at a time when he did not own the security, unless he rejected the offer in writing within thirty (30) days of its receipt. In connection with any such offer, the seller shall deposit funds in escrow in a state or national bank doing business in the State of Texas, or receive an unqualified commitment from such bank to furnish funds, sufficient to provide for the refund on all securities covered by the offer. The notice accompanying such offer shall state (1) the name of such bank where the refund may be obtained upon surrender of the security, or if the buyer has disposed of such security upon satisfactory proof of such disposition and of the value received therefor, and (2) that buyer, upon receipt of the refund, may not sue to recover the consideration paid plus interest or for damages under Subsection A(1) of this Section 33, and (3) that the buyer, in the event of failure to accept the offer within thirty (30) days of its receipt, may not sue to recover the consideration paid plus interest or for damages under Subsection A(1) of this Section 33. No person may sue under Subsection A(2) more than three (3) years after the contract of sale or more than three (3) years after the buyer in the exercise of ordinary care should have discovered that such sale was made in violation of said Subsection A(2). Nothing in this Subsection C shall affect or restrict the periods of limitation or other rights applicable to causes of action based on fraud brought pursuant to Article 4004 of the Revised Civil Statutes.

* * *

Act 1957, 55th Leg., p. 575, ch. 269, § 33; Acts 1963, 58th Leg., p. 473, ch. 170, § 12.

Section 10 (b) of the Securities Exchange of 1934, 15 U.S.C. 78j (b):

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by

the use of any means or instrumentality of interstate commerce or of the mails, of any facility of any national securities exchange —

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. June 6, 1934, c. 404, § 10, 48 Stat. 891.

Rule 10b-5, 17 C.F.R. 240.10b-5:

§ 240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interestate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud.

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

(Sec. 10; 48 Stat. 891; 15 U.S.C. 78j) [13 F.R. 8183, Dec. 22, 1948, as amended at 16 F.R. 7928, Aug. 11, 1951]

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February 7, 1975

Hon. A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
Room 1702
United States Courthouse
Foley Square
New York, New York 10007

Re: Berry Petroleum, et al.
v. Adams & Peck, et al.
Docket No. 74-2588

Dear Sir:

I am enclosing for filing in the above styled appeal the following:

(1) Twenty-five copies of Appellants' Brief; and

(2) Ten copies of Joint Appendix.

By copy of this letter, I am forwarding to each counsel of record two copies of Appellants' Brief and one copy of the Joint Appendix.

Respectfully submitted,

Steve Philbin

Stephen Philbin

SHP/sw
Encls.

cc: Counsel of Record:

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